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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 997

HIDEYOSHI NAGAYAMA, *Petitioner,*

v.

SHOKUWAN SHIMABUKURO (JESSE S. SHIMA).

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, AND SUPPORTING BRIEF.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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CASES CITED.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

To the Honorable, the Chief Justice, and Associate Justices of the Supreme Court of the United States:

Hideyoshi Nagayama, by his attorneys, prays that a Writ of Certiorari issue to review the final judgment of the United States Court of Appeals for the District of Columbia, entered in the above-entitled cause on January 3, 1944, reversing the judgment of the District Court of the United States for the District of Columbia, entered on October 13, 1943 (R. 38).

OPINIONS BELOW.

This appeal was taken from the U. S. Court of Appeals for the District of Columbia since they reversed the verdict and judgment of the lower Court (R. 38). The trial court wrote no formal opinion and denied a motion for a new trial in its order (R. 40).

The opinion of the United States Court of Appeals for the District of Columbia (R. 125-128) is found in 78 App. D. C. —— Fed. (2d) —— (Adv. Sheets). A timely petition for a rehearing was denied by the United States Court of Appeals for the District of Columbia on March 9, 1944 (R. 134-135).

STATEMENT OF MATTER INVOLVED.

The petitioner, Hideyoshi Nagayama, filed a complaint in the District Court of the United States for the District of Columbia on August 24, 1939, in an action of debt, claiming that he had loaned money and extended credit to the respondent in the amount of $3,935.00 and the respondent had paid only a total of $320.00 on account. The respondent refused to pay the balance of said indebtedness and denied that he owed any money to the petitioner. The case was tried before three different juries and each verdict was for your petitioner. The first verdict (R. 23-24) was in the amount of $3,895.60. The respondent filed a motion for a new trial which was granted (R. 24-30). Your petitioner then retried this case before a new jury and was rendered a verdict in the amount of $3,743.15 (R. 30-31). The respondent filed a motion for a new trial (R. 31-33) and the court vacated the verdict and granted a new trial (R. 34). Your petitioner then tried this case before a third jury and received a verdict of $1,000.00 (R. 38). The respondent then filed a motion to vacate the verdict and grant the respondent a new trial for which the same was denied (R. 40). The respondent then appealed this case to the United States Court of Appeals for the District of Columbia, assigning several errors, none of which were sustained, but

the Court of Appeals, which admitted that there were issues of fact to be determined by the jury, (R. 125-128) reversed the Lower Court and remanded the case for a fourth new trial and set up, among other things, that the trial court did not properly instruct the jury and the Court of Appeals assigned this as an error in granting the respondent a new trial. There was no objection by the respondent to the instructions given by the trial judge nor was the instruction assigned as error, but was raised for the first time by the Appellate Court in their opinion (R. 127). This alleged error was not argued at the hearing, therefore, petitioner has not had an opportunity to defend against the same.

JUDICIAL STATEMENTS.

The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code which provided that Certiorari shall be granted:

> "In any case, civil or criminal, in a circuit court of appeals, or in the United States Court of Appeals for the District of Columbia, it shall be competent for the Supreme Court of the United States . . . to require certiorari . . . that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought here by unrestricted appeal."

The ruling of the Appellate Court denied the petitioner due process of law since the Appellate Court on its own motion reversed the Lower Court on a question of instruction to the jury when the instruction by the trial judge was not objected to by the respondent at the time the instruction was given and was, therefore, raised for the first time by the Appellate Court. In the case of the *Federal Trade Commission* v. *Algomal Company*, 291 U. S. 67 at page 73, the court said:

> "In fact what the court did was to make its own appraisal of the testimony, picking and choosing for itself among uncertain and conflicting inferences."

We maintain that the questions involved are substantial since (1) Court of Appeals for the District of Columbia has rendered a decision in conflict with the decisions of other circuit courts of appeals on the same matter, and this Court of Appeals decision is in conflict with its own prior and subsequent decisions on the same matter; (2) and the Court of Appeals has decided the case not in accord with applicable decisions of this court.

Federal Rules of Civil Procedure Rule 51 states:

> "No party may assign as error the giving or the failure to give an instruction unless he objects before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

This decision nullifies Federal Rule 51 since there was no objection to the instruction of the trial judge. We also maintain that the rules of Court have the force of law and are binding on the courts as well as party litigants.

The judgment to be reviewed is the judgment of the United States Court of Appeals for the District of Columbia, entered on January 3, 1944 (R. 125-128). Timely petition for a rehearing was denied on March 9, 1944 (R. 134), thus, making it a final judgment for the purpose of this petition.

QUESTIONS PRESENTED.

1. Did the Lower Appellate Court err in raising a question of instruction of the trial judge for the first time after the case was presented on appeal when no objection to the instruction was made at the time of the trial?

2. Is it a violation of due process of law for an Appellate Court on its own motion to reverse a case on the grounds that an instruction was improper when no objection to the instruction was made at the trial of the case nor on the

appeal of the case, but was raised for the first time only by the Appellate Court and not by the respondent?

3. Is it a violation of due process of law for an Appellate Court not to give the proper effect to applicable decisions of the United States Supreme Court?

4. Is Federal Rule 51 of Civil Procedure nullified by this decision?

REASONS FOR THE ALLOWANCE OF WRIT OF CERTIORARI.

The case is in conflict with the other circuit court of appeals on the same matter. The decision is in direct conflict with the applicable local decisions.

This decision nullifies Federal Rule No. 51 of Civil Procedure which in substance requires exceptions to instructions be made before the jury retires.

This procedure established by the Appellate Court allows the said Court on its own motion to decide questions which have been decided by a jury and leads to endless litigation. It has long been the general rule of law that an Appellate Court will consider only such questions as were raised in the Lower Court. This rule is based on the considerations of the practical necessity in orderly administration of law and fairness to the court and the opposite party. Obviously, the ends of justice will be served by the avoidance of the delay and expense instant to appeals, reversals and new trials upon grounds of objection which might have obviated or corrected in the trial court if the question had been raised. There would be no assurance of any end to litigation if new objections could be raised on appeals. Whether a party has the option to object or not, if he sees fit, the failure to exercise the objections when the opportunity thereof presents itself must in fairness to the court and to the adverse party, be held either to constitute a waiver of the right to object or to raise an estoppel against the subsequent exercise thereof.

We further maintain that your petitioner was taken by

surprise when the Appellate Court raised a question of an improper instruction to the jury since your petitioner had no notice of the alleged error; and therefore, could not defend the same as the question was never raised in the lower court or by the respondent in the Appellate Court.

We, therefore, maintain that this court has held through a long line of decisions that a question cannot be raised for the first time in an Appellate Court if there was no objection in the Lower Court and to establish a precedent allowing an Appellate Court to do so would be denying your petitioner a due process of law under the Federal Constitution. The purpose of our law is to allow a jury to decide questions of fact. Thirty-six juries have passed on this question and now an Appellate Court on its own motion has by this case established a dangerous precedent which should be reversed by this Honorable Court.

WHEREFORE, your petitioner respectfully prays:

1. That this court issue a Writ of Certiorari to the United States Court of Appeals for the District of Columbia to certify and send to this court a full and complete transcript of the record herein, to the end that the cause may be reviewed and determined by this court as provided by law, that the judgment or order may be reversed with cost.

2. And for such other and further relief as may be appropriate.

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BRIEF IN SUPPORT OF PETITION AND WRIT OF CERTIORARI.

OPINIONS BELOW.

The opinions of the United States Court of Appeals for the District of Columbia is reported in 78 App. D. C. — Fed. (2nd) (R. 125-128). The trial judge wrote no formal opinions.

JURISDICTION.

Jurisdiction is founded in section 240 (a) of the Judicial Code as amended and which is quoted above in the petition. Also jurisdiction is provided on the grounds that the Appellate Court improperly construed Federal Rule 51 of Civil Procedure.

SPECIFICATION OF ERRORS TO BE URGED.

1. The Appellate Court erred in raising a question of instruction of the trial judge for the first time after the case was presented on appeal and no objection to the instruction was made at the time of the trial nor was any objection made to the instruction by the respondent on appeal.

2. It is a violation of due process of law for an Appellate Court, on its own motion, to reverse a case on the grounds that an instruction to the jury by the trial judge was improper when no objection to the instruction was made at the trial of the case, nor on the appeal of the same, but was raised for the first time by the Appellate Court and not by the respondent.

3. It is a violation of due process of law for an Appellate Court not to give proper effect to the applicable decisions of the United States Supreme Court, other circuit courts and the local court.

4. That the instruction of the trial judge in the lower court was not improper.

5. This decision nullifies Federal Rule 51 of Civil Procedure.

SUMMARY OF ARGUMENT.

The petitioner maintains that this court should grant a Writ of Certiorari for the following reasons:

I. Conflict With Other Circuits.

We maintain that other circuit courts have held that a case cannot be reversed on appeal by an improper instruction unless an objection was duly made at the time of the trial of the case in the lower court.

In the case of *Sofarelli Bros. Inc.* v. *Elgin*, United States Circuit Court of Appeals, Fourth Circuit, July 22, 1942, 129-F (2nd) 785 at page 788 the court said:

> "Even, however, if the instruction on the subject of overhead be regarded as erroneous, Sofarelli is not in position to raise this question on appeal. No objection to this portion of the charge was made when Judge Coleman asked counsel for any exception to his charge. See Federal Rules of Civil Procedure, Rule 51: 'No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection.''

Also in the case of *Hupp Motor Car Corporation* v. *Wadsworth*, 113 F. (2nd) 827, the court said:

> "No objection was made to the Court's charge on this point, and under Rule 51 of the Federal Rules of Civil Procedure, it is not reviewable."

Also the same point was covered in the case of *Armit* v. *Loveland*, 115 F. (2nd) 308, and *Krug* v. *Mutual Benefit Health Accident Association, etc.*, 120 Fed. (2nd) 296.

II. (a) This Decision Does Not Follow Applicable Decisions of the United States Supreme Court.

In the case of *Federal Trade Commission* v. *Algomal Company*, 291 U. S. 67, at page 73, when the Appellate Court ignored the testimony, the court stated as follows:

> "The findings of the Commission as to the facts, if supported by testimony, shall be conclusive. The Court of Appeals, though professing adherence to this mandate, honored it, we think, with lip service only. In form the Court determined that the finding of unfair competition had no support whatsoever. *In fact what the court did was to make its own appraisal of the testimony, picking and choosing for itself among uncertain and conflicting inferences.* Statute & decision (Federal Trade Commission v. Pacific States Paper Trade Assoc., 273 U. S. 52, 61, 63, 71 L. ed. 534, 537, 538, 47 S. Ct. 285) forbid that exercise of power."

Also this court has ruled in the three following cases which we maintain are applicable to this case.

In the case of *Fleischmann Construction Co.* v. *U. S.*, 270 U. S. 349, 70 L. ed. 624, at page 357, the court said:

> "These are not open to review, as there were no special finding of fact and no exceptions to the ruling on matters of law were taken during the progress of the trial or duly preserved by a bill of exceptions."

In the case of *Pacific Exp. Co.* v. *Malin*, 132 U. S. 531, 33 L. ed. 450, at page 538, the court said:

> "While exceptions may be reduced to form and signed after the trial, they must appear affirmatively to have been taken before the jury withdrew from the bar, United States v. Carey, 110 U. S. 51 (28: 61), and cases cited."

In the case of *Palmer* v. *Hoffman*, 318 U. S. 109, at page 117 the court said:

> "He who seeks to have a judgment set aside because of an erroneous ruling carries the burden of showing that prejudice resulted."

We maintain that the Court of Appeals, when it reversed the trial judge, improperly construed the case of *Hormel* v. *Helvering*, 312 U. S. 552, since they spoke of your petitioner's case as a "particular circumstance" and an "exceptional" case (R. 127), wherefore we maintain that this case does not come within the same category as it is only a collection case for money due, whereas in the *Hormel* v. *Helvering* case was an appeal from the Board of Tax Appeals in which the court, speaking of "exceptional cases," said:

> "The exceptions to the general practice is in accord with the *statutory authority given to courts* reviewing decisions of the Board of Tax Appeals . . ."

Therefore, we maintain that the court of Appeals improperly construed the above-entitled case in rendering its decision and thus this case should be reviewed by this honorable court.

II. (b) This Case in Conflict With Local Decisions.

We further maintain that this case is in direct conflict with the local decision of our United States Court of Appeals for the District of Columbia, since the law seems to be well settled that an objection to an instruction cannot be raised on the appeal unless the objection was taken at the time of the trial of the case. In the case of *Baltimore and Ohio Railroad Company* v. *Corbin,* 73 App. D. C. 124, at page 126, the court said:

> "We are not required to consider whether failure of the signals is in itself evidence of negligence on the part of the defendant, for Appellant made no objection to the instructions in this respect before the jury retired. See Rule 51, Federal Rules of Civil Procedure."

Also in the case of *Cohen* v. *Evening Star Newspaper* 72 App. D. C. 258, 113 F. (2nd) 523, and also in a very recent case and after the decision of the present case, the Court of Appeals in the District of Columbia ruled in *Mike Asha* v. *Charles Goldstein et al.,* decided on February 14, 1944, 78 App. D. C....., the court stated as follows:

> "The sole ground of appeal is an alleged error of the court below in instructing the jury. Appellant made no objection to the instruction at the trial and, therefore, under rule 51 of the Federal Rules of Civil Procedure the judgment will be affirmed."

The Court of Appeals for the District of Columbia has long held that questions of facts should be decided by the jury and has also held in the case of *Christie* v. *Callahan,* 75 App. D. C. 133, near the bottom of the page 148, the court said:

> "Unfortunately the case is one in which, as it comes to us, it is necessary to hold that the jury was justified in ignoring important and, in some respects, undisputed testimony. That would have been true, whatsoever its verdict. None could have been rendered which would not have ignored important, convincing and crucial evidence, given, as we think, by honest and honorable witnesses. *It is in just such cases that courts are required to keep hands off the jury's business.* We must do so here.
>
> The judgment is affirmed."

Therefore, we maintain that your petitioner was denied due process of law by the failure of the Appellate Court to follow the local applicable decisions.

III. This Decision Nullifies Federal Rule 51 of Civil Procedure.

This rule has been quoted and cited in the above, therefore, we maintain that this case nullifies Federal Rule 51 as an Appellate Court is not allowed to reverse a judgment of the lower court on the grounds that an instruction was erroneously made when there was no objection made to the same.

We further maintain that the rules of court have the same force and effect as statues of law and therefore binding on the courts as well as any parties to a case. This seems to be a well established principle of law and we feel does not need the citing of any case to support the same.

CONCLUSION.

In conclusion, we rest this case on the grounds that the Appellate Court denied the petitioner due process of law when the petitioner was taken by surprise when an objection was raised on appeal the first time when no exception was taken to the same at the time of the trial. Also, the Appellate Court has not given proper effect to the applicable decisions of this court by claiming that the petitioner's case is "exceptional" or "particular circumstances" to warrant a reversal. Therefore, we maintain that this court should grant a Writ of Certiorari so that the petitioner may have his case heard and determined by an Appellate Court as will assure him due process of law.

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